

For Labour Only

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Worker

The purpose of this paper is to look at the definition of “*worker*” in the relevant Queensland workers’ compensation legislation (“the relevant legislation”)¹. In particular this paper will look at the law with respect to the phrase “*a person who works under a contract, or at piece rates, for labour only or substantially for labour only*”². It is also intended to look to other concepts which extend the definition of worker and compare those concepts and their corollary in the extended definition of “*employer*” against the substantive definition of “*employer*” within the relevant legislation .

It is not intended to discuss what might be termed “*the results test*” in the extended definition under the relevant legislation; that is the subject of a paper to be delivered by Peter Major, barrister-at-law.

Persons covered by the relevant legislation are primarily those who work under a contract of service⁴, however, even although a person might not work under a contract of service, that is a relationship of employer-employee, the person may still be a worker within the meaning of the relevant workers’ compensation legislation by virtue of the extended definition of worker within the schedules to the relevant legislation. In particular, I refer to a person who works under a contract, or at piece rates, for labour only or substantially for labour only. This person might be termed independent contractor, ie sub-contractor.

It has been said that special provisions to include subcontractors who substantially perform work rather than take the profit within workers’ compensation legislation has been a feature of Australian law for some time⁵. An example of this is an early Queensland case⁶.

In that case it was held where a person was engaged to perform manual labour in circumstances where remuneration to be received was understood and intended to be in substance a reward for that manual labour, that person was properly regarded as a worker for the purposes of the workers’ compensation legislation without analysis of or characterisation of the contract⁷. That pre-dated the inclusion of the phrase under consideration in the relevant legislation.

However of recent times it has been thought that, and relying on income tax cases⁸, there had been a distinction between a contract for labour only and a contract where the contractor has undertaken to produce a given result and the remuneration becomes payable when and only when the contractually

1. See WorkCover Queensland Act 1996 and Workers’ Compensation and Rehabilitation Act 2003.

2. See s.1, Part 1, sch 2 to WorkCover Queensland Act 1996 and s.1, Part 1, sch 2 to Workers Compensation and Rehabilitation Act 2003.

3. See sch 2 and 2A and s.32 of WorkCover Queensland Act 1996 and sch 2 & 3 and s.30 of Worker’s Compensation and Rehabilitation Act 2003.

4. See s.12(1) of WorkCover Queensland Act 1996 and s.11(1) of Workers’ Compensation and Rehabilitation Act 2003.

5. See WorkCover Queensland v J M Kelly Pty Ltd (2003) 173 QGIG 589.

6. See Herbert v Edelston [1909] StRQd 316.

7. See J M Kelly (supra).

8. See Neale v Atlas Products (Vic) Pty Ltd (1955) 94 CLR 419, and World Book Australia Pty Ltd v Commissioner of Taxation (1992) 27 NSWLR 377.

conditions have been fulfilled⁹. It was said, looking at the term “wholly or principally for labour only”,
*“It may be that there are contracts of service which are wholly or principally for the labour of a person and which are not undertaken by the contractor to produce a given result. To the rewards of such contracts, the definition may apply. But a contract which is undertaken to the contractor to produce a given result is not in my opinion, a contract wholly or principally for the labour of the person for reason that the labour is undertaken not for the principal but for the contracting party himself to produce the result he has contracted to produce”*¹⁰.

That distinction was examined in a recent case in the Industrial Court¹¹. In the circumstances of that case it was said that the distinction was quite unhelpful as the putative worker had not contracted to produce a particular result and was not labouring for himself to earn money payable upon the achievement of a result. The putative employer had contracted not to pay for the result but to pay for such time as was worked in achieving the result, that is the installation of the Miska expansion joints.

In concluding his judgment in that case, Hall P said,

*“The outstanding issue is whether Mr Fitzgerald was a person who was working under a contract for labour only or substantially for labour only, it seems to me that he was. It is immaterial that he provided his own tools. Section 1 of schedule 2 Part 1 does not stop at bringing within the definition of ‘worker’ persons who work under a contract for labour only. It goes further ...so that the definition may apply not only where the remuneration is a return for manual labour...and for nothing else, but also where, although the remuneration is a return for something else also, the something else is comparatively so insignificant that in reality, or as one might say to all intents and purposes, it is the return for manual labour...”*¹².

In a more recent case in the Industrial Court¹³, the issue of the applicability of the results test set out in the tax cases to the relevant legislation was examined. The President noted that there were obvious differences between the provisions of the *Income Tax Assessment Act 1936* and the schedules to the relevant legislation. His Honour went on to say:

“Whatever may be said of the provisions of the WorkCover Queensland Act 1996 dealing with actions for personal injury, the provisions about statutory benefits are plainly in the nature of beneficial legislation. Schedule 2, Part 1, s. 1 should be construed to give the fullest relief which a fair meaning of its language will allow without straining or exceeding the true significance of the provision; Townsville Trade Waste Pty Ltd v Commercial Union Assurance Company of Australia Ltd [2000] Qd.R 682 at 684 to 685 per McMurdo P.

9. See World Book case (supra).

10. See World Book case (supra).

11. See J M Kelly (supra).

12. See *Marshall v Whittaker Building Supply Co* (1963) 109 CLR 210 at 214, per Kitto, Taylor, Menzies and Owens JJ. See also *Summit Homes v Lucev* (1996) 19 WAR 566.

13. See *Brett Holt Plumbing Pty Ltd v Q-Comp Review Unit* (2005) 178 QGIG 255.

In the era to which Neale v Atlas Products (VIC) Pty Ltd (1955) 94 CLR 419 and World Book (Australia) Pty Ltd v Commissioner of Taxation (1992) 27 NSWCLR 377 belong, the general proposition was that transactions were taxed only where clearly falling within the words of the statute compare Pearce and Geddes, Statutory Interpretation in Australia, 4th edition at paragraph 9. 25.

Further, the explicit purpose of the scheme at s. 12 and Schedule 2 is to bring some persons within the definition of “worker” without regard to whether the characterisation is justified (Part 1), and to exclude other persons from the definition without regard to whether characterisation as a “worker” is truly justified (Part 2). Additionally, whereas one may readily grasp the notion of “payment made wholly or principally for the labour of the person to whom the payments are made” with which the fiscal cases were concerned, read literally Schedule 2, Part 1, s. 1 is a nonsense. A person cannot work under a contract “substantially for labour only”. A person may work under a contract for labour only. A person may work under a contract other than for labour only. A person working under a contract otherwise than for labour only may be paid principally for the labour expended. But a person cannot work under a contract “substantially for labour only” nor may a person be paid “substantially for labour only”. The adjectives “substantially” and “only” are antipathetic. Schedule 2, Part 1, s. 1 is the imperfect expression of an idea. It has to be read robustly lest the imperfections impede achievement of the section’s purpose. In all those circumstances the Industrial Magistrate was right not to brush onto Schedule 2, Part 1, s. 1 the authorities upon s. 221A of the Income Tax Assessment Act 1936.

In the event the Industrial Magistrate relied on a passage in a decision of this Court, viz. WorkCover Queensland v J. M. Kelly Project Builders Pty Ltd (2003) 173 QGIG 589. The passage at 591 is:

“The outstanding issue is whether Mr Fitzgerald was a person who was working under a contract for labour only or substantially for labour only. It seems to me that he was. It is immaterial that he provided his own tools. Section 1 of Schedule 2. Part 1 does not stop at bringing within the definition of ‘worker’ persons who work under a contract for labour only. It goes further ‘...so that the definition may apply not only where the remuneration is a return for manual labour... and for nothing else, but also where, although the remuneration is a return for something else also, the something else is comparatively so insignificant that in reality, or as one might say to all intents and purposes, it is the return for manual labour ...’, Marshall v Whittaker’s Building Supply Co (1963) 109 CLR 210 at 214 per Kitto, Taylor, Menzies and Owen JJ. See also Summit Homes v Lucev (1996) 16 WAR 566.”

It may be conceded that the issue raised on this appeal did not squarely arise in Kelly, ibid. In that case the putative worker was employed at an hourly rate and paid for the time worked. But the decision (after full argument) went beyond the material facts. Having regard to the nature and purpose of the statutory benefits regime, the scheme at s. 12 and Schedule 2 and the

deficiencies in the language of Schedule 2, Part 1, s. 1, it seems to me that the second limb of the section is about the remuneration paid under a contract, not the nature of the contract, and is satisfied where in reality or “to all intents and purposes” the remuneration is in return for manual labour. If that be the test there is (and could not be) any suggestion that it was misapplied by the Industrial Magistrate.”

The law with respect to the term “*substantially for labour only*” is about the remuneration paid under a contract and matters not whether it may appear that the contractor is to achieve a specific result, or that the worker provides his own tools and equipment, or that the worker is liable for the costs of rectifying any deficits in the work. That has been an argument raised in a number of cases and in particular in the most recent Industrial Court cases. The term “*substantially for labour only*” focuses on what in fact the putative worker is being paid.

It remains to be seen whether, if somebody fits within the concept of *substantially for labour only*, and also fits within the concept of the results test as set out in the relevant legislation, they are compensable. Given the beneficial nature of the legislation, it would be my view that even although a person is paid to achieve a specific result or outcome, has to supply the plant and equipment of tools of trade needed to perform the work, and is or would be liable for the cost of rectifying any defect in the work performed, if in reality or to all intents and purposes the remuneration paid under the contract was *substantially for labour only*, then that person would be a worker for the purposes of the relevant legislation. It may depend on the degree to which those other issues are involved in the circumstances of the case.

Most of the other inclusory provisions, save for the results test, are self-explanatory and are mirrored in the schedule which deems certain persons to be “employers”¹⁴. However, the putative employer with respect to a “contract for labour only or *substantially for labour only*” is not included in the deemed employer schedule prior to 18 November 2004¹⁵. Prior to 18 November 2004, the relevant legislation only included a provision that a person mentioned in sch 2A Part 1 or sch 3 Part 1 was an employer. However since that date the definition of employer also includes a person who enters into a contract with an individual in circumstances mentioned in sch 2 Part 1.

Prior to 18 November 2004, it may be that this anomaly has some ramifications with respect to other parts of the Act.

In summary, it seems that a person can be engaged under a contract, the nature of which is irrelevant to this determination of whether that person is a worker, if for all intents and purposes the payment made under the contract is in substance a return for manual labour. It matters not that the remuneration also includes payments for other items if that is not significant. It matters not that the person is engaged to achieve a specific result or has to provide their own tools or has to rectify any defects in the work themselves and, finally, whether they delegate or even subcontract some of the work.¹⁶

14. See sch 2A of WorkCover Queensland Act 1996 and sch 3 of Workers' Compensation and Rehabilitation Act 2003.

15. See s.32 of WorkCover Queensland Act 1996 and s.30 of Workers' Compensation and Rehabilitation Act 2003.

16. See Brett Holt Plumbing (supra).